DEC 1 0 2008

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
David W. Rogers	)	SENSITIVE
	)	
Friends of Dave Rogers and Christian Winthrop, in his official capacity as Treasurer	)	MUR 5572
	)	
Rogers for Congress n/k/a Special Operations Fund and Christian Winthrop, in his official capacity as Treasurer.	)	

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GENERAL COUNSEL'S REPORT #2

I. ACTIONS RECOMMENDED

Find probable cause to believe that David W. Rogers, Friends of Dave Rogers and Christian Winthrop, in his official capacity as Treasurer ("FODR"), and Rogers for Congress n/k/a Special Operations Fund and Christian Winthrop, in his official capacity as Treasurer ("RFC"), (referred to collectively hereinafter as "Respondents") violated 2 U.S.C. § 439a and 11 C.F.R. § 113.1, and approve the attached proposed conciliation agreement.

II. BACKGROUND

The Commission previously found reason to believe that Respondents violated 2 U.S.C. § 439a and 11 C.F.R. § 113.1. The basis for these findings was information that David Rogers and his 2002 campaign committee, FODR, and his 2004 campaign committee, RFC, violated 2 U.S.C. § 439a when Rogers converted campaign contributions to his personal use by taking the proceeds from the sale of contributor mailing lists developed with committee funds and using that money for personal expenses. *See* Factual and Legal Analysis in MUR 5572.

The results of the ensuing investigation are fully set forth in the General Counsel's Briefs ("GC Brief(s)") issued to David W. Rogers, FODR, and RFC, which are incorporated herein by reference. In sum, FODR and RFC spent over $200,000 of campaign contributions to develop a valuable mailing list, which Rogers (with the committee's consent) then sold to a mailing vendor, with Rogers retaining $56,000 in proceeds for his personal use. *See* GC Brief at Attachment 1 (schedule of payments) and Attachment 3 (sales agreement). Neither FODR nor RFC received any proceeds from the sale of the mailing list.

Respondents do not dispute the facts as to the committee's significant disbursements to develop the mailing list, the sale of the list to a mailing list vendor for $56,000, or that Rogers retained the entire proceeds from the sale for his own personal use. *See* Response Brief filed Feb. 5, 2008 ("Response Brief").

Instead, Respondents argue that a 2001 Memorandum of Understanding ("MOU") between the candidate and FODR granted Rogers co-ownership of the campaign donor list and all names generated as a result of direct mail solicitation. The MOU, which is attached to the GC Brief, states that Rogers is being granted co-ownership in the list as compensation for his personal contribution to the creation of the list, as well as for the use of his name, signature and life story in committee fundraising letters. *See* Response Brief at 3-6. *See also* GC Brief at Attachment 2. Respondents assert that the MOU represents an exchange of fair market value because anecdotal evidence suggests that there is a well-established commercial practice by which candidates and officeholders lend their names and/or likenesses to groups for political mailings in return for some right to use the resulting list of names. *See* Response Brief at 4-5.

Respondents also maintain that the Commission's decision to abandon a 2003 rulemaking on the regulation of mailing lists left the regulated community without notice as to the precise

standards that would be applied to mailing list transactions, and that the absence of such guidance is a reason not to pursue this enforcement action. *Id.* at 2.

On September 24, 2008, the Commission held a Probable Cause hearing ("PCTB hearing") pursuant to 72 Fed. Reg. 64919 (Nov. 19, 2007), at which Respondents' counsel presented arguments and responded to questioning as to the positions in the Response Brief. *See* PCTB hearing transcript.

Based on our consideration of the GC Brief, the Response Brief, and PCTB hearing testimony, we recommend that the Commission find probable cause to believe that Respondents violated 2 U.S.C. § 439a and 11 C.F.R § 113.1, and approve the attached proposed conciliation agreement.

III. LEGAL ANALYSIS

Under 2 U.S.C. § 439a(b)(1) of the Federal Election Campaign Act of 1971, as amended, ("the Act"), a "contribution accepted by a candidate . . . shall not be converted by any person to personal use." Commission regulations, however, state that "the transfer of a campaign committee asset is not personal use so long as the transfer is for fair market value." 11 C.F.R. § 113.1(g)(3). Thus, the central issue in this matter is whether, in connection with the execution of the MOU, Rogers provided FODR and DRC with valuable consideration that would represent a fair market value exchange for co-ownership of the committee's mailing list. 2 U.S.C. § 439a.

The Commission has previously addressed what constitutes a fair exchange for the use of an organization's mailing list. In Advisory Opinion 1981-46 (Dellums I), the Commission concluded that "if the exchange of names on a contributor list is an exchange of names of equal 'value' according to accepted industry practice, the exchange would be considered full

consideration for services rendered." The Commission likewise found permissible the exchange of names for future use of a corresponding number of names from another committee. *See id.* at 2. *See also* Advisory Opinion 1982-41 (Dellums II) (a campaign committee could sell a mailing list so long as the committee charged the "usual and normal" rate for the list).

As noted in the GC Brief, the committee mailing list contained over 20,000 names, and was sold for $56,000. *See* GC Brief at 7. FODR and DRC had developed the mailing list, which included an original list of 500 to 1,000 names provided by Rogers through various means, largely by purchasing or renting various other donor lists at a cost of approximately $211,648.20. *See* Rogers Dep. Tr. at 40-43. Specifically, FODR spent $173,306.34 for "lists" and "list services," and RFC spent $38,341.86 for "list acquisition" and "mailing list."[1] *See* GC Brief at 4 n.7. While the amount spent to develop the list is not necessarily equivalent to its fair market value at the time it was converted by Rogers, such costs are evidence of the committees' investment in making the final list of more than 20,000 names, which was substantially more valuable than the initial list of 500 to 1,000 names that Rogers provided.

As set forth below, Respondents have not established that Rogers provided the committees with any valuable consideration in exchange for his purported co-ownership in the mailing list. Further, Respondents do not reconcile Rogers's purported co-ownership of the list pursuant to the MOU with the sales agreement that claimed to convey sole ownership in the list to a mailing list vendor. *See* GC Brief at Attachment 3. Thus, even assuming *arguendo* that Rogers had a co-ownership right to the mailing list under the MOU, a co-ownership interest also remained with the committees. Accordingly, Rogers's sale of the list for $56,000, and retention

[1] The amounts cited above do not include expenditures made for "direct mail," "direct mail creatives," "direct mail production," "direct mail caging," "direct mail printing," "mail," or "mail services." With all of those categories included, FODR and DRC spent over $1.3 million on direct mail expenses.

of 100% of the proceeds, with no payment to the committees, constitutes a prohibited personal use of a committee asset developed with campaign contributions. 2 U.S.C. § 439a.

A. **FODR and DRC Already Had the Right to Rogers's Name**

As a preliminary matter, the Act requires candidates for Federal office to designate in writing a political committee to serve as its principal campaign committee. 2 U.S.C. § 432(e)(1); 11 C.F.R. § 102.13. The Act further requires that "[t]he name of each authorized committee shall include the name of the candidate who authorized such committee . . ." 2 U.S.C. § 432(e)(4); 11 C.F.R. § 102.14. Thus, the Act and the Commission's implementing regulations effectively require that an authorized committee use the candidate's name in its statement of organization, on all disclosure reports filed by the committee, and in any communication that requires the identification of the committee. *See* 2 U.S.C. §§ 433, 434 and 441d.

By designating FODR and DRC as his principal campaign committees, Rogers already had granted them an unrestricted right to use his name for the purpose of the congressional election campaign. Further, as Respondents conceded at the PCTB Hearing, campaign committees also are inherently authorized to use the candidate's life story in order to elect him to Congress. *See* PCTB Hearing Tr. at 17. Thus, because FODR and DRC already had the right to use Rogers's name and life story, the MOU seemingly provided no valuable consideration when it authorized their use of Rogers's name, signature, and life story.

The fact that FODR and DRC already had the right to Rogers's name and signature also distinguishes this matter from the mailing list transactions cited by the Response Brief and raised at the probable cause hearing. Respondents relied in particular upon the evidence of industry practice presented to the Commission in MURs 4382/4401 (Dole for President), where Senator Dole had exchanged his signature on a fundraising letter for an independent group, not under

Senator Dole's control, in return for limited use of the names generated in response to that letter. The evidence in that matter established that a group independent of Senator Dole was willing to exchange a limited use of its mailing list for valuable consideration that it did not already have, the right to use Senator Dole's name. The Commission's recognition of this industry practice regarding mailing list exchanges is necessarily limited to groups other than principal campaign committees (which already have the right being conferred in the Dole matter).

Respondents also argue, without support, that the use of Rogers's name and life story constituted valuable consideration because of the potential lost value his name and life story could suffer following the campaign. *See* PCTB Hearing Tr. at 20-21. Respondents argued that a candidate might want to restrict how parts of their life story could be used by a campaign committee. Accordingly, Respondents maintained that some consideration was due to compensate Rogers for any possible devaluation to his life story in connection with the campaign. *See id.* at 17-21. Although Respondents suggested that the committees had not utilized Rogers's entire life story, they provided no explanation of any specific limits placed on the committee by the candidate. Moreover, Respondents never provided any evidence to demonstrate that the right to use Rogers's name and life story either had any actual market value prior to the congressional campaigns, or that the value of his name and life story had suffered any loss in market value as a result of the congressional campaigns.

B. <u>There Was No Exchange of Fair Market Value</u>

Even assuming, *arguendo*, that the Act and implementing regulations did not already authorize the committee to use Rogers's name and life story, Respondents unpersuasively argue that (1) the MOU represents a bargained-for exchange at fair market value, and (2) the terms of the MOU are similar to mailing list transactions reported in the press and brought to the

Commission's attention in two prior enforcement matters. Respondents' position that the MOU granted Rogers co-ownership of the list and names generated from subsequent solicitations remains unpersuasive because there was no bargained-for exchange and the transactions cited as precedent were significantly different from the MOU in this matter.

1. There was no Arm's-Length Negotiation for the MOU Resulting in a Bargained-for Exchange

The Commission has consistently evaluated the permissibility of a transfer based on whether the arrangement can be considered a "bargained-for exchange of equal value" and where the party receiving a mailing list has paid the "usual and normal charge" for the list. A "usual and normal charge" is determined by "accepted industry practice," AO 1981-46, or by "the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution." AO 1981-53 (Frazier). The concept of "usual and normal charge" considers both "[t]he price that a seller is willing to accept *and* a buyer is willing to pay on the open market and in an arm's-length transaction." BLACK'S LAW DICTIONARY 1549 (7th ed. 1999) (*emphasis added*).

Rogers, as the candidate, had the power both to give direction to and fire the FODR treasurer, who Rogers claims negotiated the MOU on behalf of RFC. *See* PCTB Hearing Tr. at 16. Thus, Rogers was effectively on both sides of the purported transaction between himself and FODR, so there was no arm's-length transaction that resulted in a bargained-for exchange. *See* GC Brief at 7-10 and PCTB Hearing Tr. at 15-16, 30.

The committee treasurer's continued employment was dependent on Rogers's discretion. *See* PCTB Hearing Tr. at 15-16. This transaction is distinguishable from one in which a candidate lends his name to a party committee, multicandidate committee, or independent

organization not under the candidate's control. *See id.* at 28-30. Accordingly, the MOU does not represent a bargained-for agreement between independent parties in an arm's-length transaction.

2. The Lists Lacked Equal Value

Respondents argue that candidates often exchange their signatures for generated names on a mailing list. *See* Response Brief at 4 n.5 (discussing AOs 1981-46 and 1982-41). While the AOs establish that the Commission has approved the exchange of lists of equal value and multi-party exchanges of lists with roughly equal number of names, there was no similar exchange in this matter. Moreover, Respondents' argument as to the industry standard for fair market exchange is undercut by the fact that rather than obtaining a limited use of the mailing list, as was the case in the Dole matter, Rogers purports to have obtained co-ownership of the entire list in return for granting the committees a right which they already had.

Other than Rogers's name and life story, which are discussed above, the only consideration provided was Rogers's initial mailing list of approximately 500 to 1,000 names. GC Brief at 3; Rogers Dep. Tr. at 32-33. This list consisted of personal contacts from Rhode Island, the Navy, his college fraternity, and friends of his parents. Rogers Dep. Tr. at 32-33. Rogers did not spend any funds to develop the list, nor did he claim or record any ownership interest in the initial list provided to the committee. *Id.* The Committees also did not disclose the receipt of this initial list as an in-kind contribution from Rogers, which would have been required if the initial list had market value of $200 or more. 11 C.F.R. § 104.13(b). Indeed, at the PCTB Hearing, Respondents stated they had no position or estimate as to the purported value of this initial list and acknowledged that there was a definite distinction between any value that could be ascribed to the initial list and the market value of the final committee list of over 20,000

names that was sold to a list vendor. PCTB Hearing Tr. at 63. Thus, Respondents concede that the initial list did not constitute consideration of value equal to the final list for which Rogers eventually received $56,000.

Respondents also seek to justify the MOU by citing to one of several Statements of Reasons ("SOR") in MUR 5181 (Ashcroft 2000), a matter in which the Commission split 3-to-3 on the permissibility of certain mailing list transactions. Although Respondents cite to an SOR that found the mailing list exchange between a candidate and a leadership PAC under his effective control to be permissible, an equal number of Commissioners signed an SOR raising concern about that arrangement that did not appear to be an arm's-length transaction. *See* MUR 5181: Statement of Reasons of Chair Weintraub and Commissioners Thomas and McDonald at 6-7. The facts of the Rogers transaction are materially different than the facts present in MUR 5181. First, the leadership PAC did not have the same legal claim to the candidate's name as a principal campaign committee. Second, unlike the candidate-supplied original list in this case, the original mailing list that Ashcroft supplied to his leadership PAC appears to have been of far greater size and value than the original list of 500 to 1,000 names in this matter. Further, Ashcroft's signature as a former governor, sitting U.S. Senator, and bona fide presidential contender may have had a value substantially greater than the signature of the lesser-known congressional challenger in this matter.

C. Respondents' Reliance on the Commission's 2003 Mailing List Rulemaking is Flawed

Respondents maintain that the Commission's decision not to promulgate a final regulation during a 2003 rulemaking on mailing list issues left the regulated community without proper notice of the rules governing those transactions. Response Brief at 2-3; PCTB Hearing

Tr. at 4. The Commission's September 4, 2003, Notice of Proposed Rulemaking included proposals such as an express ban on the conversion of a mailing list to personal use and codification of the requirement that mailing list rentals and sales be conducted at the "usual and normal charge." *See* 68 Fed. Reg. 52,531, 52,532 (Sept. 4, 2003).

Respondents argue that the Commission's decision not to promulgate a rule left them without the guidance required to comply with the law. PCTB Hearing Tr. at 8. This argument is flawed. Respondents signed the MOU in 2001 and began to take payments in 2003, before the Commission's Notice of Proposed Rulemaking to address mailing lists of political committees. Accordingly, the Commission's decision not to promulgate a rule had no effect on their actions.

The absence of regulation does not preclude the Commission from adjudicating matters that involve mailing lists on a case-by-case approach. *See Shays v. Federal Election Com'n*, 511 F. Supp. 2d 19, 29-31 (D.D.C. 2007) (allowing the FEC to use a case-by-case approach to determine when a section 527 political organization is a political committee under the Act). In closing the rulemaking after receiving public comments, the Commission noted that the regulated community did not perceive a need for a rulemaking and that Advisory Opinions provided "clear enough guidance" on the issue. *See* Mailing Lists of Political Committees, 68 Fed. Reg. 64,571 (Nov. 14, 2003) (terminating the rulemaking). Lastly, Respondents could have sought an Advisory Opinion to resolve any purported lack of certainty over granting co-ownership in a mailing list.

D. Conclusion

Accordingly, based on the GC Briefs, the Response Brief, and information derived from the PCTB hearing, this Office recommends that the Commission find probable cause to believe that Respondents violated 2 U.S.C. § 439a and 11 C.F.R. § 113.1.

IV. PROPOSED CONCILIATION AGREEMENT

[redacted]

V. RECOMMENDATIONS

1. Find probable cause to believe that David W. Rogers violated 2 U.S.C. § 439a and 11 C.F.R. § 113.1
2. Find probable cause to believe that Friends of Dave Rogers and Christian Winthrop, *in his official capacity as Treasurer*, violated 2 U.S.C. § 439a and 11 C.F.R. § 113.1
3. Find probable cause to believe that Rogers for Congress n/k/a Special Operations Fund and Christian Winthrop, in his official capacity as Treasurer, violated 2 U.S.C. § 439a and 11 C.F.R. § 113.1;
4. Approve the attached proposed conciliation agreement; and
5. Approve the appropriate letters.

12/9/2009
Date

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